(2)

No. 91-649

In The

Supreme Court of the United States

October Term, 1991

MARVIN GREENE and LAKE ANNE REALTY, CORP.,

Petitioners,

- against -

TOWN OF BLOOMING GROVE, SUPERVISOR AND TOWN BOARD OF TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. CULLEN
D'AMATO & LYNCH
Counsel of Record
for Respondents
70 Pine Street
New York, New York 10270
(212) 269-0927

WILLIAM P. LARSEN, III
Co-Counsel for Respondents

DONALD G. NICHOL
JACOBWITZ & GUBITS
Co-Counsel for Respondents
158 Orange Ave.
P.O. Box 367
Walden, New York 12586-0367
(914) 778-2121

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does the United States District Court have pendent jurisdiction of a claim for equitable relief of declaratory judgment on a zoning claim based on state law as part of an action in which the plaintiff seeks relief under 42 U.S.C. §1983 for recovery of monetary damages and other relief, if:

a) The complaint does on specifically demand declaratory judgment based on a state law claim;

b) There is no separately identified claim for equitable relief of declaratory judgment stated under state law;

c) The Court of Appeals by its prior order has remanded the action to try the issue of the plaintiffs' specific disputed property right as an element of plaintiffs' claim under 28 U.S.C. 1983, but does not disturb the District Court's decision dismissing the only stated cause of action of declaratory judgment that could be interpreted as arising out of state law based on expiration of statute of limitations; and

d) The jury did not define the scope of plaintiffs' vested right and further found that the defendants had not deprived plaintiffs of any such property rights in violation 42 U.S.C. §1983?

2. Was it required for the Court of Appeals to strike such provision of the District Court's judgment which was amended pursuant to Civil Rule 60?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

This petition arises from an action commenced by the Plaintiffs/Petitioners Marvin Greene and Lake Anne Realty Corporation against Defendants/Respondents the Town of Blooming Grove, its Town Board, Supervisor, Inspector, Planning Board and Board of Zoning Appeals.

Blooming Grove is a small municipal corporation located in Orange County, New York. Petitioners are the owners of several large parcels of real property located in Blooming Grove. Included among Petitioners' holdings is a parcel of land of some 136± acres. Petitioners' amended complaint stated that of that 136± acres, on a 10± acre portion there are situated 123 cottage and motel style units. The remainder of the 136± acres is shown as a golf course and ski area on the approved plan. The Blooming Grove Code defines a bungalow colony as including "accessory recreational facilities".

After the construction of the existing "bungalows", in the 1950's and 1960's, Blooming Grove, in a valid exercise of its police power, enacted a zoning Ordinance which made "bungalow colonies" a non-conforming use. In addition, the Zoning Ordinance, adopted on October 7, 1974, provided for minimum lot sizes based on the density of construction which could safely be supported by the terrain. One type of zone, denominated as R-30, requires a minimum lot size of 30,000 square feet. On less hospitable terrain, the Ordinance established an R-80 zone which requires a minimum lot size of 80,000 square feet. There are in excess of one dozen separate R-80 zones in Blooming Grove.

On or about October 17, 1973, Petitioners applied to Blooming Grove for permission to construct 264 bungalow units in addition to the units already in place. At that time the Town denied the application based upon the belief that a town-wide building moratorium proscribed such new construction. Petitioners commenced a proceeding in state court to challenge the Town's determination. The Court directed the Town to consider Petitioners' application on its merits. During the pendency of the appeal of this decision, the Town amended its Zoning Ordinance to make "bungalow colonies" a non-conforming use. Based upon the Zoning Ordinance as amended, the Town again denied Petitioners' application to enlarge the "bungalow colony". Petitioners again sued in state court to compel the Town to grant the application. The Court ruled that applications were to be decided pursuant to the then-existing law.

On November 1, 1983 Petitioners sought a building permit to add an extra, unheated room onto several attached dwellings which Petitioners call "motel style units". Blooming Grove denied the application on November 21, 1983. Petitioners appealed the denial to the Zoning Board of Appeals which also denied the application.

On or about July 3, 1986 Petitioners applied for permission to build an additional 419 bungalow dwellings. No pre-existing approval for the 469 units was ever found in Blooming Grove's files. The existence of such an approved plan was not demonstrated by the petitioners. The latest approved plan showed the remainder of the 136 acres as a golf course.

On August 11, 1986, Petitioners applied for a building permit to renovate a certain building which they called a "hotel". The application sought permission to work on apartments, rooms, a luncheonette and cocktail lounge. The uses of the building's transient rooms, luncheonette and cocktail lounge had long since fallen into abandonment. However, since Petitioners were able to show that at least one apartment had been continuously rented, the Town issued a permit for the work on the apartments only.

On October 22, 1986, Petitioners were served with a summons for operating an illegal dump. This action is still pending before the Town Court of Blooming Grove. It is being prosecuted jointly by the New York State Department of Environmental Conservation.

These are the facts Petitioners alleged in the District Court that gave rise to claims of deprivation of constitutional rights in violation of 42 U.S.C. §1983.

After the parties filed cross-motions for summary judgment, the District Court in an Order dated November 18, 1988 granted summary judgment to Blooming Grove dismissing all of the eight causes of action alleged in the amended complaint (see Petition, Appendix B). On appeal, the Court of Appeals affirmed the dismissal of seven of the eight claims and remanded to the District Court the factual issue of whether Petitioners had a protectable property right under New York law, the deprivation of which could state a claim for relief under 42 U.S.C. §1983. *Greene v. Blooming Grove,* 879 F.2d 1061 (2d Cir. 1989). (See Petition, Appendix C.)

The District Court conducted a jury trial which commenced on February 5, 1990 and concluded on February 14, 1990. The jury was instructed by the Court on the elements of a cause of action for violation of 42 U.S.C. §1983. The jury then returned a unanimous verdict in favor of the Defendants/Respondents and against the Plaintiffs/Petitioners. The jury did not enter any verdict in favor of the petitioners/plaintiffs in accordance with the special instructions. Judgment for the Defendants/ Respondents was subsequently entered.

Thereafter, Petitioners moved pursuant to Federal Rules of Civil Procedure 59 and 60 to alter or amend the Judgment of dismissal entered on the jury verdict. The District Court granted that motion and amended the judgment to award declaratory relief to Petitioners stating that they have a vested right to extend a non-conforming use by adding 419 two bedroom houses to the 125 bungalows which presently exist on a 136± acre parcel of land in Blooming Grove. The Zoning Code (§30:46) requires an application to the Zoning Board of Appeals to expand a non-conforming use. The District Court failed to address why petitioners were not required to make such an application or why approval by the Town Planning Board (Zoning Code §30.44), State and County Health Department (New York Public Health Law) and the New York State Department of Environmental Conservation was not needed.

Petitioners commenced this action by service of a summons and complaint on January 6, 1987. Subsequently an amended complaint was filed on March 11, 1987 (Appendix). The amended complaint basically alleges that the Respondents are pursuing a course of

conduct depriving the Petitioners of their property without due process of law and depriving Petitioners of the equal protection of law in violation of the plaintiff's rights under the 5th and 14th Amendments of the Constitution, all in violation of 42 U.S.C. §1983. The amended complaint states eight causes of action. The causes of action that are relevant are the third cause of action and fourth cause of action, respectively. After the Court of Appeals' Order of July 17, 1989, all but the fourth cause of action were dismissed.

The third cause of action of the amended complaint alleges that the Petitioners applied to the Respondent Planning Board for approval for a revised map of its bungalow colony on October 17, 1973 which provided for an additional 264 bungalow units to be built. It was further alleged that the Respondent Planning Board refused to consider this application because of a moratorium on construction of single family dwellings in subdivisions and multiple dwellings in the Respondent Town of Blooming Grove. Thereafter a proceeding was brought by the Petitioners in the Supreme Court of the State of New York, Rockland County, which resulted in a decision that the moratorium was inapplicable to plaintiff's application, remanding the matter to the Planning Board for consideration of the acceptability of a revised survey map in accordance with the applicable zoning ordinance. A copy of this decision was included as an Exhibit to the amended complaint. The amended complaint also alleged that, while the Planning Board's appeal from that Order was pending, the Town adopted a Zoning Ordinance of 1974 which eliminated the provisions of the prior zoning ordinance which had allowed

the planned bungalow colony as a permitted use. The Planning Board's appeal was subsequently dismissed as moot.

It is further alleged in the amended complaint in the third cause of action that Petitioners appeared before the Planning Board and were informed that the Planning Board would not consider the acceptability of the revised map due to the new Zoning Law of 1974. In the additional proceedings before the Supreme Court of Rockland County, New York, the Petitioners sought to hold the Planning Board in contempt for failure to comply with the earlier Order of August 5, 1974. However, the Supreme Court, Rockland County, held that the Planning Board could not be held in contempt for a refusal to consider an application under the provisions of a zoning ordinance which no longer existed. The court, as part of its decision, stated that its holding was "without prejudice to any proper proceeding or action Petitioner may be advised to initiate to determine his 'vested rights' claim" (App. P. 36). The Petitioners alleged in their third cause of action in the amended complaint that the wilful, wrongful and deliberate delay by Respondents allowed the new Zoning Ordinance to be adopted and further that it did so in an unlawful attempt to defeat Petitioners' right to build their additional bungalows as set forth in its application. At the close of this third cause of action Petitioner stated that they were entitled to "a vested right to construct at least 264 additional units shown on such revised survey." (App. p. 9).

In the fourth cause of action set forth in the amended complaint, the Petitioners articulate an application for similar but different relief. In this cause of action the

Petitioners assert that under the prior zoning law it had devoted the 136 acres of its property to the bungalow colony use and had specifically improved 10 acres of the total parcel and had provided service infra-structure, such as clubhouse, pool and water systems, which was of sufficient capacity to accommodate the eventual completion of the development of the 136 acres of the planned bungalow colony use. Subsequent to the trial, the NYSDEC cited the petitioners for discharging sewage without a State Pollution Elimination Discharge Systems Permit. The proposed permit specifically limits petitioners to the exiting units. The Petitioners assert that with the adoption of the 1974 Zoning Ordinance its prior use became a "vested non-conforming use". Petitioners assert thereafter they submitted to the Respondent Building Inspector an application for building permits for an additional 419 bungalows to be added to the original 123 units of the bungalow colony. The Petitioners assert a right to issuance of a building permit on the basis of plaintiff's constitutionally vested rights to complete the development of a planned bungalow colony with the number of units allowed under the zoning ordinance prior to the adoption of the Zoning Ordinance of 1974. The petitioners fail to note that the maximum number of units is limited by the need to have an approved plan for recreational facilities. This fourth cause of action closes with the allegation that the Respondents' conduct "constitutes a deliberate and purposeful attempt to deprive plaintiffs of their property without due process of law, to take plaintiffs' property without the payment of just compensation and to deprive plaintiffs of their constitutionally protected rights in violation of the 5th and 14th

Amendments of the Constitution of the United States and 42 U.S.C. §1983." (App., p. 12.)

Prior to trial on this matter the District Court by Order of November 18, 1988 (Petition, Appendix B) granted the Respondents' motion for summary judgment and dismissed all of the plaintiffs' claims. On appeal to the Court of Appeals, this decision was affirmed with respect to all claims "except the claim that the vested nonconforming use of Greene's land as a bungalow colony extends to the entire 136 acres previously approved for bungalow colony use" as set forth in the decision rendered July 17, 1989 (Petition, pp. 1c-13c). The Court in its discussion of the earlier appeal by the Petitioners clearly indicated that their discussion involved the Petitioners' "appeal from a summary judgment dismissing *inter alia*, their claims under 42 U.S.C. §1983 . . . " (Petition, p. 2c) based on the Petitioners' allegations that they have been deprived of due process and equal protection under the Fourteenth Amendment by classifying a portion of its land under R-80 residential zoning rather than R-30 and, alternatively, that the Petitioners were deprived of property without due process by the Town's failure to recognize Petitioners' claim to a nonconforming bungalow colony use for the 135 acres designated as a bungalow colony as approved in the earlier map. With respect to these issues described in the Circuit Court's decision, the only matter which was remanded to the District Court was:

> On the question of whether Greene's vested nonconforming use as a bungalow colony should extend to the entire parcel, we reverse

> and remand for further proceedings because triable issues of fact are presented. (Petition, p. 3c).

The dismissal of all other claims in the amended complaint was affirmed by the Circuit Court.

The issue and cause of action that were remanded by the Circuit Court were tried before a jury in the District Court. The only factual issue with respect to allegations of property rights which was remanded to the District Court for determination, as a basis for any claim under 28 U.S.C. 1983, was that based on whether Petitioners' nonconforming use as a bungalow colony should extend to the entire parcel. It was this particular factual issue as to a claimed property right which formed the basis for a claim under 28 U.S.C. §1983 (in the fourth cause of action), and none other, which was remanded for trial to the District Court. There is no mention in the order of any claim based on state law for declaratory judgment or other equitable relief claimed by the Petitioners. The District Court's dismissal of the third cause of action based on statute of limitations defense was left undisturbed.

THE COURT OF APPEALS DECISION IN THIS §1983 ACTION IS CONSISTENT WITH PRIOR LAW ON PENDENT JURISDICTION

The Petitioners present arguments to the Court depicting the Court of Appeals' decision as one creating a conflict among the circuits and, most importantly, inconsistency with its own prior decisional law on the issue of pendent jurisdiction which in large part has been followed or adopted in other Circuits. The Court of Appeals' decision, however, is consistent and in harmony

with its prior law and the standard it has employed in determining the power and prudence of the federal courts exercising pendent jurisdiction in particular circumstances.

In *Leather's Best Inc. v. S.S. MORMACLYNX*, 451 F.2d 800 (2d Cir. 1976), a leading case on pendent jurisdiction in the Second Circuit, the Court permitted the exercise of pendent jurisdiction where a federal claim was asserted for loss of cargo under Admiralty Law against one defendant and a similar claim against its subsidiary co-defendant for the same loss, the latter of which the Court of Appeals found on appeal could be based solely on state law. The Court therein stated the two pronged test that must be utilized where the Court is asked to exercise pendent jurisdiction: to wit, whether the court has the power to hear a state claim; and whether, assuming the power, the court should hear the state claim as a matter of discretion. 451 F.2d 809. With respect to the question of power to hear a claim, the court must look to the "substantiality" of the federal issues and then inquire whether there is a "common nucleus of operative facts" sufficient to invoke pendent jurisdiction as well as determine if Congress has expressly or implicitly negated exercise of jurisdiction over such claims. *Leather's Best, Inc.*, 451 F.2d at 811. If the case hurdles the first obstacle, it must still be determined whether the case is appropriate, in the Court's discretion, to be heard by the court. The basis for the exercise of pendent jurisdiction "lies in the considerations of judicial economy, convenience and fairness to litigants." 451 F.2d 816; See *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

The Court of Appeals decision in this matter is consistent with the standards set for the exercise of pendent jurisdiction by the federal courts, even if the result is different here. In this action the Petitioners assert claims for recovery under 28 U.S.C. §1983, asserting eight causes of action in their complaint, seven of which were dismissed on summary judgment after appeal; the surviving cause was dismissed after trial by jury verdict. The Court of Appeals found that the district court did not have the power to hear the state claim since this claim was not properly pleaded. The circumstances found in *Leather's Best, Inc., supra,* such as an identity of the elements of the state claim as opposed to the federal claim actually tried, were not present to justify exercise of this jurisdiction. The Court of Appeals below specifically noted not only the failure of the Petitioners to plead a state claim for declaratory judgment, but also noted the fact that this question was first broached after judgment was entered and the failure to mention such claim at any stage where it would normally be raised, e.g. proposal of jury charges, the formulation of the special jury verdict form for submission to the jury or at the time of rendition of the verdict (Petition pp. 8a-11a). The Court of Appeals simply found that this matter does not meet the standards previously imposed by the courts. *Leather's Best, Inc.* must also be distinguished on a very simple but crucial fact. After it was determined that the claim against the defendant Tidewater was based in state law rather than Admiralty law, there still remained a federal claim in Admiralty (against the defendant carrier) and there was still a single nucleus of operative facts (i.e. the particular loss of the

cargo). *Leather's Best, Inc., supra,* is a particular application of pendent *party* jurisdiction, and its facts are not common or even analogous to this action.

Even if the Court of Appeals' analysis set forth in the opinion below is found to be insufficient, there are sufficient grounds to support the Court of Appeal's finding that the district court cannot exercise pendent jurisdiction in this matter. "Litigants cannot create federal jurisdiction by filing an insubstantial action under the civil rights statutes." *Studen v. Beebe,* 588 F.2d 560, 566 (6th Cir. 1978); *Burnett v. McNabb,* 565 F.2d 398 (6th Cir. 1977). With regard to claims brought pursuant to §1983, the courts have repeatedly held that if the federal claims are dismissed before trial, even though substantial in a jurisdictional sense, the state claims should be dismissed as well. See *Rogin v. Bensalem Township,* 616 F.2d 680 (3d Cir. 1980); *Ohio Inns, Inc. v. Nye,* 542 F.2d 673 (6th Cir. 1976); *Morse v. Wozniak,* 565 F.2d 959 (6th Cir. 1977); *United Beverage Co. of South Bend, Inc. v. Indiana Alcoholic Beverage Commission,* 760 F.2d 155 (7th Cir. 1985). The federal courts have carved out exceptions to the usually liberal application of pendent jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction over a pendent claim. *Bell v. Hood,* 327 U.S. 678, 682-83, 66 S.Ct. 773, 776-77, 90 L.Ed. 939 (1946); *Stephenson v. Esquivel,* 614 F. Supp. 986, 991 (D.N.Mex. 1985).

The question is then raised whether the district court may exercise pendent jurisdiction if a matter proceeds beyond summary disposition to where a trial or factual adjudication is held on the federal claim. The federal

court must, in certain circumstances, as are present here, abstain from the exercise of pendent jurisdiction over a state claim.

There is also a deference to the state courts in certain matters which have a greater impact on local interests that the state courts are better equipped to handle. One such interest is land use regulation. "Today the Supreme Court affords state and local governments broad latitude in enacting and implementing legislation affecting the use of land. Implicit in this deference is the recognition that land-use regulation generally affects a broad spectrum of persons and social interests, and that local political bodies are better able than federal courts to assess the benefits and burdens of such legislation." *Rogin v. Bensalem Township, supra,* at 697. A conventional attack on the constitutionality of zoning regulations is a matter to be resolved in state court. *City of East Lake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358 (1976); *Studen v. Beebe, supra.* Where federal claims are brought, including claims under 42 U.S.C. §1983, and are dismissed after a factual adjudication, pendent state claims in subject areas where the state has just such a strong interest will not be heard. See *Studen v. Beebe, supra* (where claims under 42 U.S.C. §§1983 and 1985 were dismissed after trial on the merits, zoning dispute claims must be heard by the state court of Ohio); *Manchester v. Lewis,* 507 F.2d 289 (6th Cir. 1974) (where federal claims under 42 U.S.C. §1983 are denied after full evidentiary hearing, state claims relating to teacher's tenure law cannot be heard); *Burnett v. McNabb, supra* (case heard on stipulation of facts and federal claims under 42 U.S.C. §1983 are dismissed, there is no pendent jurisdiction with regard to

claims brought under state beer licensing laws); and *Bates v. Dause*, 502 F.2d 865 (6th Cir. 1974) (where claims brought pursuant to 42 U.S.C. §1983 are dismissed after trial, claims under teachers' tenure law are dismissed for lack of pendent jurisdiction).

Vested rights must be determined in the first instance by the local board charged with enforcement of the zoning law. Matter of *Kadin v. Bennett*, 163 A.D.2d 308, 557 N.Y.S.2d 441 (2nd Dept., 1990); *Matter of G.M.L. Land Corp. v. Foley*, 21 A.D.2d 645, 246 N.Y.S.2d 338 aff'd 14 N.Y.2d 823, 251 N.Y.S.2d 472, 200 N.E.2d 455 (1964). In the present matter, plaintiff has not applied to, let alone received, a determination from the applicable administrative agency which under New York Law must determine vested rights. The Town of Booming Grove Zoning Code at §30.46(C) provides specifically that the expansion of a nonconforming use can only be approved upon application to the Town's Zoning Board of Appeals. Plaintiff has made no such application. Further, the Town's Zoning Code provides for site plan approval (Zoning Code §30.44). Plaintiff has made no application to the Planning Board for additional units for his bungalow colony subsequent to an application in 1973 which the Court ruled that the Planning Board was not required to consider.

Permitting the Court to determine the nature and extent of vested rights flies directly in the face of the Court's decision in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In that action the property owner obtained a jury verdict and award of

damages. The Supreme Court reversed holding the property owner's failure to seek a variance from the appropriate agency rendered the action unripe per judicial determination:

> As the Court has made clear in the recent decisions, a claim that the application of government regulations affects the taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application and the regulations to the property at issue . . . If the property owners were to seek administrative relief under these [variance] procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviously any need to address the constitutional questions. The potential for administrative solutions confirms the conclusion that the taking issue is simply not ripe for judicial resolution. [citations omitted] id. 473 U.S. at 187.

Thus, it is clear that it is totally improper for the District Court to issue declaratory judgment defining the nature and extent of the vested right which has not been considered by the local administrative agencies. In fact, such declaratory judgment is not supported by the jury verdict which did not address the scope, nature and/or extent of plaintiff's vested right. It is equally likely that the jury found that the vested right extending to the 136 acres was for the facilities including golf course and ski area as shown on the approved map rather than 419 units or simply that the jury merely answered the question "yes" in accordance with the instructions in order to reach the central issue of their determination, which was

whether or not the Town violated Plaintiff's rights. In fact, there is a logical inconsistency to assuming that the jury's answer to question number "1" indicated plaintiff's entitlement to 419 units. The jury then found the Town had not violated any rights of the plaintiff. Since the Town has not permitted the construction of the additional 419 units, the theory that the jury found an entitlement to those units does not follow.

It is clear as a matter of law that plaintiff lacks a plethora of approvals necessary to expand his bungalow colony by 419 units including, *inter alia*, approvals from the New York State Department of Environmental Conservation, the New York State Public Service Commission, the New York State Department of Health, the Orange County Department of Health and the Orange County Department of Transportation, as well as those needed from Town agencies. It defies logic for the District Court to issue declaratory judgment indicating a right to build a specific number of units where in fact the necessary approvals for such a project have not even been applied for.

Post-trial events clearly demonstrate the pitfalls of trying to determine zoning in a courtroom 75 miles from the municipality wherein the project will take place. The New York State Department of Environmental Conservation has cited plaintiff for operating the existing bungalow colony without any of the necessary permits for sewage disposal. The application for the necessary sewage disposal permit is still pending. The proposed permit limits the discharge to 22,600 gallons per day of sanitary wastewater. This proposed permit limits the size of the bungalow colony to the existing buildings. An addition of 419 units to the existing 125 would clearly cause major impacts which must be reviewed by the administrative agencies charged with the duty of reviewing

applications. It is not proper for the Court to declare rights without the necessary input from the state and local administrative agencies or, for that matter, the public itself. New York State Law requiring coordinated review among the many agencies and public notices of their actions would provide for a complete and thorough review, unlike the sequestered review of a single judge in a distant courtroom without the necessary facts to make such a determination. A consent order which the plaintiff has signed regarding its violations concerning sewage disposal, a matter which was not raised in the trial, clearly demonstrates the inappropriateness of declaratory judgment in this instance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: New York, New York
November 15, 1991

JOHN J. CULLEN
Counsel of Record*
WILLIAM P. LARSEN, III
D'AMATO & LYNCH
for Respondents
70 Pine Street
New York, New York 10270
(212) 269-0927

DONALD G. NICHOL
JACOBWITZ & GUBITS
Co-Counsel for Respondents
158 Orange Ave.
P.O. Box 367
Walden, New York 12586-0367
(914) 778-2121

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

MARVIN H. GREENE and
LAKE ANNE REALTY CORP.,

Plaintiffs,

-against-

TOWN OF BLOOMING GROVE, SUPERVISOR AND TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE AND BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Defendants.

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AMENDED COMPLAINT

PLAINTIFFS DEMAND A TRIAL BY JURY

Case No. 87-Civ.-0069 SWK

Plaintiffs allege:

1. This court has jurisdiction over this action pursuant to 28 U.S.C. §1331 because it involves a federal question of law and arises under 42 U.S.C. §1983.

2. Plaintiff Lake Anne Realty Corp. is the owner of several parcels of real property situated in the Town of Blooming Grove, Orange County, State of New York.

3. Plaintiff Lake Anne Realty Corp. is a New York corporation which is and at all times hereinafter referred to was wholly owned by plaintiff Marvin H. Greene.

4. At all times hereinafter referred to the aforesaid parcels were owned by plaintiff Lake Anne Realty Corp., by plaintiff Marvin H. Greene or by some other corporation which was wholly owned by Marvin H. Greene.

5. Marvin H. Greene also sometimes conducts business under the trade name Lake Anne Country Club.

6. The word "plaintiffs" as used herein will refer to Marvin H. Greene, Lake Anne Realty Corp. or such other corporation wholly owned by Marvin H. Greene as may have been the then owner of the parcel referred to.

7. Defendant Town of Blooming Grove, a municipal corporation, is a political subdivision of the State of New York, located in Orange County, State of New York, and the other defendants are officers or boards of said municipality.

8. Defendants are pursuing a course of conduct which deprives plaintiffs of their property without due process of law and which deprives plaintiffs of the equal protection of the law in violation of plaintiffs' rights under the 14th Amendment of the Constitution of the United States, which takes plaintiffs' property for public use without just compensation in violation of plaintiffs' rights under the 5th Amendment of the Constitution of the United States, and which deprives plaintiff of his liberty and infringes upon plaintiffs' right to be secure against unreasonable searches and seizures as guaranteed

by the 14th Amendment to the U. S. Constitution, all of which is in violation of 42 U.S.C. § 1983.

9. Defendants are pursuing said course of conduct under color of state law viz. New York Town Law, Article 16 §§261-284, the New York State Uniform Fire Prevention and Building Code, and local law viz. the zoning ordinance and the subdivision regulations of the Town of Blooming Grove and the Code of the Town of Blooming Grove.

As and For a
First Cause of Action

10. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 of this complaint.

11. On October 7, 1974 the defendant Town of Blooming Grove adopted the Zoning Map of the Town of Blooming Grove which established the boundaries of the districts or zones created by the Zoning Ordinance of 1974, later codified as Chapter 30, "Zoning" of the Town of Blooming Grove Municipal Code.

12. The aforesaid Zoning Map placed lands in an area lying between Clove Road and the boundary of the Town with the adjacent Town of Woodbury into two districts, an R-30 Residence District for the lands lying closer to Clove Road and an R-80 Conservation Residence District for the lands lying closer to the Town of Woodbury.

13. Plaintiffs own property which is included within said area.

14. Property within an R-30 Residence District may be used, inter alia, for single family detached dwellings on lots having a minimum lot area of 30,000 square feet with community sanitary or water plant and a minimum lot area of 40,000 square feet without community sanitary or water plant.

15. Property within an R-80 Conservation Residence District may be used, inter alia, for single family detached dwellings on lots having a minimum lot area of 80,000 square feet and the restrictions on the use of property within such district are otherwise more restrictive than the restrictions on the use of property within an R-30 Residence District.

16. Property in the Town of Blooming Grove is considerably less valuable when subject to the restrictions applicable within an R-80 Conservation Residence District than when subject to the restrictions applicable within an R-30 Residence District.

17. In so zoning the lands lying between Clove Road and the Town of Woodbury the defendant Town ran the dividing line between the R-80 and R-30 districts in a more or less straight line between the two districts but within plaintiffs' property the defendant Town, over plaintiffs' objections and for no apparent or explained reason, sharply diverted the direction of the line in such a way so as to include within the more restrictive R-80 district a portion of plaintiffs' property which would otherwise have been included within the R-30 district if the direction of the dividing line had not been so inexplicably diverted.

18. Although the portion of plaintiffs' property which is wrongfully included in the more restrictive R-80 district is about 35 acres, an additional area of about 35 acres belonging to a neighbor is also wrongfully included in the R-80 district, but this became known only as a result of recent surveys, the existing tax maps indicating that it was only plaintiffs' property which was wrongfully included in the R-80 district as a result of the aforesaid inexplicable veering of the district boundary line.

19. The inclusion of this 70± acre area within the R-30 district is not warranted by any proper planning or zoning considerations or any difference in the land so included from the land of others which was not so included.

20. The action of the defendant Town in including and maintaining the aforesaid 35± acres of plaintiffs' property within the R-30 district deprives plaintiffs of the due process of law and the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States and 42 U.S.C. §1983.

As and For a
Second Cause of Action

21. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 of this complaint.

22. Plaintiffs' [sic] also own a parcel of 136± acres which is used as a bungalow colony on a 10± acre portion of which there are situated 123 cottage and motel style units. A copy of plaintiffs approved planned bungalow colony map is annexed as Exhibit A.

23. On or about November 1, 1983 plaintiffs applied to the then Building Inspector of the Town of Blooming Grove for a building permit to allow the enclosure of the open porches of the dwelling units located in the three single story buildings containing the motel style units forming a part of plaintiffs' bungalow colony.

24. On or about November 16, 1983 said defendant orally denied such application and confirmed such denial in a letter dated November 21, 1983.

25. On November 28, 1983 plaintiffs appealed said action to the defendant Zoning Board of Appeals.

26. On February 8, 1984 defendant Zoning Board of Appeals denied plaintiffs any relief, refusing to allow the enclosure of said open porches.

27. Prior thereto the defendant Building Inspector had granted the applications of approximately twenty five other applicants for virtually identical permission to that requested by plaintiffs.

28. Subsequent thereto the defendant Zoning Board of Appeals granted the application of one John H. Ryan, Jr. as agent for the owners of the other properties for virtually identical permission to that requested by plaintiffs.

29. Upon information and belief plaintiffs are the only persons to whom the defendants have denied relief similar to that requested by plaintiffs.

30. The aforesaid actions constitute a deliberate and purposeful attempt by the defendants to deprive plaintiffs of the equal protection of the law and of their constitutionally protected rights under the 14th Amendment of the Constitution of the United States and is in violation of 42 U.S.C. § 1983.

As and For a
Third Cause of Action

31. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 and paragraphs 11 and 22 of this complaint.

32. Prior to the adoption of the aforesaid Zoning Ordinance of 1974 the Plaintiffs' bungalow colony was a permitted use and its cottages and motel style units and other facilities were shown on a survey map approved by the defendant Planning Board as provided for in the zoning ordinance then in force. Said survey map is the aforesaid map annexed as Exhibit A.

33. On October 17, 1973 plaintiffs applied to the defendant Planning Board for approval of a revised map which showed an additional 264 bungalow units.

34. The defendant Planning Board refused to consider plaintiffs' application on the ostensible ground that it was within the purview of Local Law No. 1, 1972 adopted by the defendant Town which imposed a moratorium on the "construction of single family dwellings in subdivisions and multiple dwellings" and prohibited the issuance of building permits for the construction of dwellings in any subdivision for the term of the moratorium.

35. A proceeding brought by plaintiffs in the Supreme Court, Rockland County, resulted in a decision that the moratorium was inapplicable to plaintiffs application and the matter was remanded to the Planning Board for consideration of the acceptability of the revised survey map in accordance with the zoning ordinance. A copy of the court's decision in said action and the order entered pursuant thereto on August 5, 1974 is annexed as Exhibit B.

36. On October 7, 1974 while defendant Planning Board's appeal from the aforesaid order was pending the defendant Town adopted the aforesaid Zoning Ordinance of 1974, which eliminated the provisions of the prior zoning ordinance which allowed a planned bungalow colony as a permitted use.

37. On March 25, 1975 the appeal taken by defendant Planning Board to the Appellate Division of the New York Supreme Court was dismissed as moot on motion of the defendant Planning Board.

38. Thereafter, on or about May 21, 1975, plaintiffs appeared before the defendant Planning Board and were informed that said defendant would not consider the acceptability of the revised survey map due to the enactment of the Zoning Law of 1974.

39. A subsequent motion by plaintiffs to hold the defendant Planning Board in contempt for failure to comply with the aforesaid order of the Supreme Court entered August 5, 1974 was denied, the court determining that it was obligated to apply the law then in force and that the Planning Board could not be held in contempt for refusal to consider an application under the provisions of

a zoning ordinance which no longer existed. A copy of the court's decision and order is annexed as Exhibit C.

40. Although the court denied plaintiff relief, it did so "without prejudice to any proper proceeding or action petitioner may be advised to initiate to determine his 'vested rights' claim."

41. The defendant Planning Board willfully, wrongfully and deliberately delayed approval of plaintiffs' application so as to allow a new zoning ordinance to be adopted under which it would no longer have authority to approve such revised survey.

42. The defendant Planning Board willfully, wrongfully and deliberately delayed such approval in an unlawful attempt to defeat plaintiffs' right to build the additional 264 bungalow units shown thereon.

43. Upon information and belief the defendants wrongfully conspired to delay approval of plaintiffs' application for the aforesaid reasons.

44. By reason of such willful, wrongful and deliberate delay plaintiffs have a vested right to construct at least the 264 additional units shown on such revised survey.

As and For a
Fourth Cause of Action

45. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9, 11, 22 and 32 of this complaint.

46. The area devoted to the bungalow colony use is, as aforesaid, 136± acres, approximately ten acres of which

were improved by the existing 123 units and a service infrastructure consisting of a clubhouse, outdoor pool, indoor pool and water system.

47. The aforesaid infra-structure was constructed with sufficient capacity to accommodate the eventual complete development of the entire 136± acre parcel devoted to the planned bungalow colony use with the additional bungalows which would have been allowable at the time said infra-structure was provided.

48. The zoning ordinance prior to its amendment in 1974 permitted bungalows at a density of four units per acre and upon the adoption of the 1974 zoning ordinance, which no longer provided for bungalow colonies, said use became a vested nonconforming use.

49. The density of four units per acre allowed by the zoning ordinance prior to its amendment in 1974 allows the development of this 136± acre parcel with 544 units.

50. On or about July 3, 1986 plaintiffs submitted to the defendant Building Inspector of the Town of Blooming Grove an application for a building permit to permit the construction of the first of a proposed additional 419 bungalows to be added to the existing 123 units at the bungalow colony.

51. Together with the aforesaid application plaintiffs enclosed a map showing the proposed location of the additional units.

52. All area requirements applicable to a bungalow colony as specified in the zoning ordinance prior to its amendment in 1974 were observed.

53. With said application plaintiffs also submitted a legal opinion with regard to plaintiff's vested right to build additional bungalow colony units on the unused portion of the entire area which is devoted to the use. A copy of said opinion is annexed as Exhibit D. Also enclosed with said application was a letter from Eustance and Horowitz, professional engineers, confirming the fact that the infra-structure provided for the bungalow colony was for a bungalow colony of the proposed size.

54. On numerous occasions plaintiffs were advised by the respondent Building Inspector that plaintiffs' application was in the hands of the Town Attorney who would write a memorandum with regard to the right of the plaintiffs to the issuance of a building permit.

55. After nearly seven months had elapsed and numerous requests had been made for action the Town Attorney, on January 29, 1987, wrote said memorandum. In it he stated that he had made a diligent search for an approved map for a planned bungalow colony and planning board minutes indicating approval of such a map, that no such approval was ever given and that there is no vested right to use the premises as a planned bungalow colony.

56. The approved map for such use and the planning board minutes indicating approval of such map constitute important evidence of plaintiffs' right to use the aforesaid 136± acres as a planned bungalow colony.

57. The planning board minutes of the meeting at which the planning board approved said map and the map itself with the approval of the planning board

endorsed thereon were both in the Towns files about two years ago.

58. On information and belief the defendants or some of them purposely removed said records from the Town's files with the intention of preventing plaintiffs from proving facts necessary to establish the existence of the planned bungalow colony as a vested non-conforming use or the existence of certain facilities within said bungalow colony as elements of the bungalow colony as the same had been approved by the planning board.

59. The defendant Building Inspector has not issued or denied a building permit.

60. Plaintiffs have a right to the issuance of a building permit on the basis of plaintiffs' constitutionally vested rights to complete the development of its planned bungalow colony with the number of units allowed under the zoning ordinance prior to the adaption of the Zoning Ordinance of 1974.

61. The aforesaid continuing course of conduct by the defendants constitutes a deliberate and purposeful attempt to deprive plaintiffs of their property without due process of law, to take plaintiffs' property without the payment of just compensation and to deprive plaintiffs of their constitutionally protected rights in violation of the 5th and 14th Amendments of the Constitution of the United States and 42 U.S.C. §1983.

As and For a
Fifth Cause of Action

62. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 61 of this complaint.

63. On or about October 24, 1985 plaintiff Marvin H. Greene entered into a conditional contract with the Estate of Carl Bartels to purchase a parcel of real property situated in the defendant Town of Blooming Grove.

64. Said contract was conditional upon said plaintiff's securing the approval of the defendant Planning Board for a subdivision of that parcel from other property owned by the Estate of Carl Bartels and upon the Planning Board's approval of access to said parcel over an existing improved road known as Evergreen Lane.

65. The logical and appropriate access to said parcel is over Evergreen Lane.

66. The defendant Planning Board refuses to allow Evergreen Lane to be used for such access and refuses to grant approval of the subdivision unless plaintiff Marvin H. Greene abandons his plan to provide access over Evergreen Lane and agrees to merge the proposed parcel to be acquired from the Estate of Carl Bartels with an adjacent parcel owned by the Lake Anne Realty Corp. thereby precluding plaintiff Marvin H. Greene from developing said parcel to be acquired from the Estate of Carl Bartels as a separate parcel or subsequently selling it as a separate parcel although both said parcels are in all respects suitable for development as separate parcels.

67. Such refusal is unnecessary to effectuate any of the purposes for which the defendant Planning Board was granted the authority to approve subdivision plats.

68. The defendant Planning Board in refusing to allow the use of Evergreen Lane as the means of access to the parcel and requiring the merger of the adjacent parcel owned by plaintiff Lake Anne Realty Corp. has caused plaintiffs substantial harm, has deprived plaintiffs of the due process of the law and the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States and in violation of plaintiffs' civil rights protected by 42 U.S.C. § 1983.

69. In addition, the defendant Planning Board requires the plaintiffs to comply minutely and strictly with the technical requirements for subdivision approval in a manner which said board does not require of other persons seeking subdivision approval of comparable properties within the Town of Blooming Grove.

70. The defendant Planning Board subjects the plaintiffs to unreasonable and unnecessary delays in processing applications to which plaintiffs are applicants or interested parties and attempts to impose unreasonable and discriminatory requirements as a condition of granting subdivision approval.

71. The plaintiff Marvin Greene is treated by all the defendants as a second class citizen, not accorded the common courtesy which is accorded residents and other property owners within the Town and whose constitutional rights are disregarded by the defendants whenever an opportunity to do so arises.

72. The defendants have been and are engaged in a course of action by which they intentionally and purposely discriminate against the plaintiffs, engaging in unfair and discriminatory conduct purposefully directed towards them.

73. There is no rational basis for defendants' discrimination against plaintiffs.

As and For a
Sixth Cause of Action

74. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9, 11, 22 and 32 of this complaint.

75. Prior to the Planning Board's aforesaid October 28, 1960 approval of plaintiffs' revised Bungalow Colony Map, a copy of which is annexed as Exhibit A, plaintiffs operated a Bungalow Colony and operated a hotel containing a cocktail lounge in their bungalow colony.

76. Said hotel is labeled Building 1A on the aforesaid approved Bungalow Colony Map.

77. The schedule on the upper left side of said approved Bungalow Colony Map shows that Building 1A contains "3 units & 6 bedrooms & lobby, cardroom, luncheonette, cocktail lounge."

78. After the aforesaid approval of plaintiffs' revised Bungalow Colony Map the plaintiffs continued to operate said hotel as part of their approved bungalow colony and the cocktail lounge as part of said hotel.

79. On or about December 1984 plaintiffs started to make necessary repairs to the building and to redecorate

and completely refurbish the building, which had become run-down while being previously operated by a tenant.

80. On or about August 11, 1986 plaintiff Marvin H. Greene, during the course of said refurbishing, applied to the defendant Building Inspector for a building permit to allow the installation of certain plumbing fixtures.

81. In said application said plaintiff described the intended use of the building in a way similar to the way the use of the building was described on the approved Bungalow Colony Map, viz. as "Apts, Rooms, Luncheonette, Cocktail Lounge."

82. In August 1986 the defendant Building Inspector issued the requested permit, and plaintiffs installed said plumbing fixtures and continued to redecorate, refurnish and refurbish the hotel.

83. Plaintiffs even installed a new fireproof ceiling in the assembly room, one of the rooms of said hotel, at the direction of the Building Inspector who was present from time to time during the progress of the work and took part in conversations during which the building's use was described as that of a hotel, with no demur on the part of said defendant.

84. In a variety other ways, as well, the defendants were made aware that plaintiffs intended to reopen the building as a hotel upon the completion of renovations, and defendants never claimed that the right to use the building as a hotel had been lost, except as stated below.

85. In September 1986, while the building was undergoing renovation, the defendant Building Inspector informed plaintiff Marvin H. Greene that in her opinion

plaintiffs no longer had the right to sell liquor because that use had been abandoned or discontinued.

86. Plaintiff Marvin H. Green then called to the attention of said defendant a case decided in the New York Supreme Court, Appellate Division, Second Department, entitled Gauthier v. Village of Larchmont, 30 A.D.2d 303, 291 N.Y.S.2d 584, in which the court held that the resumption of liquor sales after a hiatus of six years in a nonconforming hotel was not an extension of the nonconforming use, as the resumption of liquor activity did not cause a fundamental change in the principal nonconforming use of the property as a hotel.

87. Thereafter, and on or about December 1986, the defendant Town was notified by the State of New York, Division of Alcoholic Beverage Control that plaintiff Marvin H. Greene had applied to said Division for a liquor license for the premises, the prior license having previously lapsed.

88. The defendant Building Inspector thereupon claimed that the hotel itself had been abandoned and the Town's attorneys wrote to the Division of Alcoholic Beverage Control that use of the premises as a hotel and bar had been abandoned for a period of time sufficient to preclude the premises being considered a valid nonconforming use and that the building permit issued by the building inspector had been issued to permit the alteration of apartments.

89. On or about January 20, 1987 the defendant Building Inspector issued to plaintiff Marvin H. Greene an Order to Remedy Violation on the grounds that a hotel

is not a permitted use in the R-40 zone in which the building is situated.

90. At no time prior to December 1986 did any of the defendants claim that plaintiffs no longer had a right to operate the building as a hotel, such claim being made only after the defendants learned that a hiatus in the accessory sale of liquor in a non-conforming hotel would not prevent the resumption of the sale of liquor.

91. There is no merit to defendant Building Inspector's claim that plaintiff's hotel use had been abandoned or discontinued.

92. Sometime prior to February 4, 1987 the defendant Building Inspector, without the plaintiffs' knowledge or consent, crossed out so much of the aforesaid application of Marvin H. Greene for a building permit as included the words "luncheonette" and "cocktail lounge" in the statement of intended use so as to leave only the words "Apts. Rooms".

93. The Town of Blooming Grove Zoning Ordinance defines a hotel as "a building or part thereof which has a common entrance, common heating system, and general dining room, and which contains seven or more living and sleeping rooms designed to be occupied by individuals or groups of individuals for compensation".

94. Upon information and belief the defendant Building Inspector wrongfully and maliciously altered plaintiff Marvin H. Greene's application for a building permit in order to be able to deny that she issued to him a building permit for a hotel use or for a cocktail lounge use.

95. Upon information and belief the defendant Building Inspector took said action and denies plaintiffs' right to a continuation of a non-conforming use of the building as a hotel in a malicious attempt to deprive plaintiffs of vested rights guaranteed them by the due process clause of the 14th amendment to the U.S. Constitution.

96. Upon information and belief defendant Building Inspector conspired with the defendants Supervisor and Town Board of the Town of Blooming Grove in seeking to thus deprive plaintiffs of said vested rights.

97. Plaintiffs have suffered and will suffer substantial monetary loss as a result of defendants aforesaid wrongful acts.

As and For a
Seventh Cause of Action

98. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 of this complaint.

99. A secluded and remote portion of plaintiffs' property within the Town of Blooming Grove is used by plaintiffs as a dump for "clean" debris such as construction debris and similar materials but not for garbage or other noxious or deleterious materials.

100. Said use has been in continuous use for over 35 years and constitutes a vested nonconforming use of plaintiffs' property.

101. On the 22nd day of October, 1986, defendant Building Inspector issued to the plaintiff Marvin H. Green a criminal summons for alleged violations of the

New York State Uniform Fire Prevention and Building Code and the Minicipal [sic] Code of the Town of Blooming Grove and thereafter filed in the Justice Court of the Town of Blooming Grove five criminal informations with respect to the alleged violations.

102. Said plaintiff was obliged to and did appear in said Justice Court to answer said alleged changes.

103. Said acts of defendant Building Inspector, were wrongful, unlawful and malicious, and constituted a false arrest of the said plaintiff.

104. Said Building Inspector knew, or a reasonable investigation by her would have revealed, that the said charges were without any substance, in fact or in law.

105. As a result of said acts said plaintiff was deprived of his liberty and was made ill and was and still is the subject of ridicule, scorn and derision, and was otherwise greatly damaged and injured in his good name and reputation in the community.

106. By said actions defendant Building Inspector deprived said defendant of his liberty in violation of the 14th Amendment of the U.S. Constitution and 42 U.S.C. § 1983.

As and For an
Eighth Cause of Action

107. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 and 99 through 106 of this complaint.

108. Prior to the commencement of criminal proceedings against plaintiff Marvin H. Greene in which said plaintiff is charged with violations because of plaintiffs' continued operation of the aforesaid dump the defendant Building Inspector without plaintiffs' consent and without a search warrant entered upon said property for the purpose of gathering evidence to be used against plaintiff Marvin H. Greene.

109. Said action by said defendant infringed on plaintiffs' right to be secure against unreasonable searches or seizures as guaranteed by the 4th Amendment to the U.S. Constitution and violates said 4th Amendment of the U.S. Constitution and 42 U.S.C. § 1983

Wherefore plaintiffs demand judgment against the defendants as follows:

1. In the sum of $10,000,000 pursuant to the provisions of 42 U.S.C. § 1983 together with costs including reasonable attorneys fees pursuant to 42 U.S.C. § 1988.

2. Declaring that the R-80 Residence District classification of plaintiffs' approximately 35 acres which were zoned as within such district instead of within an R-30 Residence District because of the diversion of the course of the dividing line between the two districts is invalid and unconstitutional and directing the defendant Town to reclassify said area as part of the R-30 Residence District.

3. Declaring that plaintiffs have a valid vested right to improve their bungalow colony by the addition of an additional 419 units in accordance with the provisions of the zoning ordinance in force prior to the adoption of the

Zoning Ordinance of 1974 as shown on the map submitted with plaintiffs' application for a building permit and directing the defendant Building Inspector to issue to plaintiffs a permit for the first of said units as applied for.

4. Declaring that plaintiffs have a valid vested right to operate the hotel which is identified as Building 1A on plaintiffs' approved bungalow colony map and as part thereof to operate a cocktail lounge for the serving of alcoholic beverages and declaring that the Order to Remedy Violation issued by the defendant Building Inspector on January 20, 1987 relating to said hotel is void and of no effect.

5. Directing the defendant building inspector to issue a building permit to allow the enclosure of the open porches of the dwelling units located in the three single story buildings containing the motel style units forming a part of plaintiffs' bungalow colony.

6. Directing the defendant Planning Board to allow the use of Evergreen Lane for access to the parcel proposed to be subdivided from other property owned by the Estate of Carl Bartels.

7. Enjoining defendants from violating plaintiffs' rights under the United States Constitution.

8. Granting such other and further relief as this court may deem just and proper.

PAYNE, WOOD & LITTLEJOHN
By /s/ Daren A. Rathkopf
Daren A. Rathkopf
A member of the firm
Attorneys for Plaintiffs
139 Glen Street
Glen Cove, New York 11542
(516) 676-0700

EXHIBIT B, ANNEXED TO AMENDED COMPLAINT – DECISION OF KELLY, J., DATED JULY 17, 1974 (Pages 30a-37a).

SUPREME COURT: ROCKLAND COUNTY

----------X

IN THE MATTER OF THE APPLICATION OF MARVIN GREENE,

Petitioner,

INDEX No. 1173/74

-against-

THE PLANNING BOARD OF THE TOWN OF BLOOMING GROVE, ORANGE COUNTY, NEW YORK, AND WILLIAM J. BROWN, TOWN CLERK OF BLOOMING GROVE,

Respondents.

----------X

THEODORE A. KELLY, J.:

This is an application by petitioner pursuant to CPLR, Article 78 to direct respondent Planning Board to approve a certain survey map submitted by petitioner pursuant to Section 7-A-10.01 of the Zoning Ordinance of the Town of Blooming Grove, or, in the alternative, directing respondent Town Clerk to issue a certificate approving said map pursuant to Section 176 of the Town Law.

Petitioner owns and operates a bungalow colony on a 136 acre parcel of land in the Town of Blooming Grove. The facility includes 123 cottage and motel style units, an outdoor pool, an indoor pool, a dining room and kitchen facility and a golf course.

A "planned bungalow colony" is a use permitted by Section 7-A-10 of the Zoning Ordinance of the Town of Blooming Grove. The term "planned bungalow colony" is defined by Section 3-B-500 of the Zoning Ordinance as a "tract of land under single ownership with buildings or structures designed in its entirety with rental cottages or dwelling units, to be used on a seasonal basis during the non-winter months, and including accessory recreational facilities listed in Section 7-A-10, for use only by residents of said planned bungalow colony and their guests."

Section 7-A-10 of the Zoning Ordinance also permits the development of additional bungalow facilities subject to certain enumerated conditions, one of which is as follows:

> "7-A-10.01 A survey map showing the location of all existing and proposed buildings and structures, including utilities, shall be prepared by the owner and three (3) copies filed with and approved by the Planning Board of the Town of Blooming Grove."

On December 4, 1972 the Town of Blooming Grove adopted a local law designated as "Local Law No. 1, 1972" which imposed a moratorium on the "construction of single-family dwellings in subdivisions and multiple dwellings" and prohibited the issuance of building permits for the construction of dwellings in any subdivision for the term of the moratorium.

On October 17, 1973 petitioner filed a survey map with the Planning Board of the Town of Blooming Grove. The map indicated the location of all existing and certain

proposed buildings and structures on petitioner's property. Petitioner requested approval of this map in accordance with Section 7-A-10 of the Zoning Ordinance. On January 9, 1974 petitioner was advised that the Planning Board would not consider the application since it was within the purview of the moratorium imposed by Local Law No. 1.

Petitioner alleges that a "planned bungalow colony" is not a subdivision or a multiple dwelling and is, therefore, not subject to the subdivision regulations of the Town of Blooming Grove or to the moratorium imposed by Local Law No. 1. He contends, therefore, that the Planning Board's refusal to consider his application for approval of the survey map was arbitrary and capricious. Should this Court determine that the Planning Board acted properly, then petitioner alternatively seeks an order directing respondent Town Clerk to issue a certificate approving the survey map on the ground that the Planning Board failed to hold a public hearing on the application and failed to take any action thereon within 45 days in violation of Section 276 of the Town Law.

There has been no opposition to the application submitted by the Panning Board and no explanation for the failure to have submitted such opposition. Respondent Brown has answered the petition and has interposed the following defenses:

(a) That the petitioner has failed to properly designate the Planning Board as a party respondent herein in that petitioner has failed to designate each member of the Planning Board as a respondent.

(b) That petitioner has failed to exhaust his administrative remedies by neglecting to apply for pre-application sketch approval or for preliminary subdivision approval or to pay the required fees therefor.

(c) That the relief requested by petitioner requires subdivision approval under Sections 207, 300, 400 and 500 of the Subdivision Regulations of the Town of Blooming Grove and that the Town, by the enactment of Local Law No. 1, has imposed a moratorium of such applications.

It is clear, therefore, that the principal issue presented for the Court's determination is whether petitioner's application constituted an application for subdivision approval, which would make it subject to the Town's Subdivision Regulations and the moratorium, or whether the application was exempt from the Subdivision Regulations and the moratorium.

Initially, the Court finds no merit to Brown's contention that the petition failed to properly designate the Planning Board as a party respondent. CPLR, Rule 2101, subd. f requires that the title of an action include the names of all parties. However, Rule 2101, subd. f permits the Court to disregard a defect in the form where a substantial right of a party is not prejudiced. It further provides that the party upon whom such paper is served shall be deemed to have waived an objection to any defect in form unless, within two days after the receipt thereof, he returns the paper to the party serving it with a statement of the particular objection.

The affidavit of service submitted by petitioner herein indicates that the petition and notice of petition

were served upon the Clerk of the Planning Board. The Planning Board has made no objection to the form of the petition and notice of petition. Hence, the objection as to form is deemed waived under Rule 2101, subd. f. Additionally, the Court finds that the alleged defect would not prejudice any substantial right since it should have been obvious to the Planning Board that it was the official body against which petitioner's application was directed.

As a second affirmative defense to the petition, Brown alleges that petitioner has failed to exhaust his administrative remedies as a prerequisite to this proceeding. Specifically, he alleges that petitioner failed to apply for pre-application sketch approval or for preliminary subdivision approval and to pay the fees therefor as required by the Subdivision Regulations of the Town of Blooming Grove. He further contends that the application filed by petitioner for the approval of the Planning Board was not a "survey map" within the meaning of Section 7-A-10.01 of the Zoning Ordinance.

Brown's second affirmative defense is predicated upon his contention that petitioner's planned bungalow colony is a subdivision. If the planned bungalow colony is not a subdivision then there would be no necessity for petitioner to file for preliminary subdivision approval. There would also be no necessity for petitioner to apply for site plan approval since Section 7-E-10 of the Zoning Ordinance exempts a planned bungalow, a use permitted by Section 7-A of the Ordinance, from the requirement of site plan approval. A finding in petitioner's favor on this issue would also be determinative of the third affirmative defense asserted by Brown wherein he alleges that the

planned bungalow colony is subject to the moratorium imposed by Local Law No. 1.

Section 7-A-10 et seq. of the Zoning Ordinance expressly provided for the expansion of an existing bungalow colony. There is nothing in these sections to indicate that the proposed plan of expansion must comply with the Town Subdivision Regulations. The only reference to the Subdivision Regulations is found in Section 7-A-10.05 of the Zoning Ordinance wherein it is expressly provided, in part, as follows:

> "A planned bungalow colony may only be sold or offered for sale in its entirety, except that if sale or subsequent sale of dwelling units is contemplated, the site plan of the development shall conform to the subdivision regulations of the Town of Blooming Grove and site improvements shall be in accordance with the standards set forth therein * * * ."

Had the Town of Blooming Grove intended to subject a planned bungalow colony to the Subdivision Regulations, then an express provision for compliance should have been made rather than a limitation of compliance only to situations where a sale or subsequent sale was contemplated. There has been no evidence submitted herein to show that petitioner contemplated such a sale or subsequent sale when he filed the survey map with the Planning Board. The Court, therefore, finds no requirement that petitioner's application be presented for subdivision approval and no requirement that the plan comply with the Subdivision Regulations. In view of the Court's determination that petitioner is not required to comply with the Subdivision Regulations, it then follows that the

plan would not be subject to the moratorium which was expressly imposed upon the "construction of single-family dwellings in subdivisions and multiple dwellings." The Court, accordingly, finds no merit to the second and third affirmative defenses.

While the Court finds no merit to the affirmative defenses set forth in the answer, it will make no determination as to the sufficiency of the survey map filed by petitioner with the Planning Board. Petitioner alleges that the map complies with all the requirements of the Zoning Ordinance. Any determination as to sufficiency, however, may only be made by the Planning Board under Section 7-A-10.01 of the Zoning Ordinance. On the present state of the record there is no indication that the Planning Board considered the merit, if any, of petitioner's survey map. The Planning Board, rather, refused to consider the application on the ground that it fell within the purview of the moratorium.

The application, accordingly, is granted to the extent that petitioner's application for approval of the survey map is remanded to the Planning Board which shall consider the acceptability or the non-acceptability of said map in accordance with Section 7-A-10 et seq. of the Zoning Ordinance. Since the application is being remanded to the Planning Board, there is no necessity to consider petitioner's demand for alternative relief.

Submit order on notice.

/s/ Theodore A. Kelly
J.S.C.
HON. THEODORE A. KELLY
Justice Supreme Court

Dated: New City, New York
July 17, 1974

Gilman, Gilman & Goldstein, Esqs.
Attorneys for Petitioner, By Bernard Stanger, Esq.,
of Counsel.
16 Orchard Street
Middletown, New York 10940

William J. Brown, Town Clerk
Town of Blooming Grove
by Gerard N. Jacobowitz,
37 Main Street
Walden, N.Y. 12586

TO: Planning Board
Town of Blooming Grove
Town Hall
Blooming Grove, New York

EXHIBIT B (CONTINUED) – ORDER OF KELLY. J., DATED JULY 31, 1974

At a special Term of the Supreme Court held in and for the County of Rockland at the Courthosue, New City, New York, on the 31st day of July, 1974.

PRESENT:

HON. THEODORE A. KELLY,
Justice of the Supreme Court.

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IN THE MATTER OF THE APPLICATION OF MARVIN GREENE,

Petitioner,

-against-

THE PLANNING BOARD OF THE TOWN OF BLOOMING GROVE, ORANGE COUNTY, NEW YORK, and WILLIAM J. BROWN, TOWN CLERK OF BLOOMING GROVE,

Respondents.

ORDER

Index No. 1173/74

On reading and filing the petition herein duly verified the 1st. day of February, 1974, praying for an order and judgment directing the Planning Board of the Town of Blooming Grove, Orange County, New York, to review and approve survey maps submitted by Petitioner and all the exhibits annexed thereto, and the verified answer of

the respondent, William J. Brown, Town Clerk, in opposition thereto, dated the 26th. day of February, 1974, and this matter having been fully submitted to the court and due deliberation having been had, and the court having made its memorandum dated the 17th. day of July, 1974, and having caused the same to be filed herein,

NOW, ON MOTION of JACOBOWITZ AND GUBITS, ESQS., attorneys for respondents, it is

ORDERED AND ADJUDGED, that the application of the Petitioner is granted to the extent that Petitioner's application for approval of the survey map is remanded to the respondent Planning Board, which shall consider the acceptability or non-acceptability of said map in accordance with the terms of Section 7-A-10 et seq. of the Zoning Ordinance..

ENTER:

/s/ Theodore A. Kelly
Justice of the Supreme Court
HON. THEODORE A KELLY
Justice Supreme Court

EXHIBIT C, ANNEXED TO AMENDED COMPLAINT – DECISION AND ORDER OF SILBERMAN, J., DATED SEPTEMBER 23, 1975 (Pages 40a-43a).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----------X

MARVIN GREENE,

Petitioner,

Index
1173/74

-against-

THE PLANNING BOARD OF THE TOWN OF BLOOMING GROVE, ORANGE COUNTY, NEW YORK, AND WILLIAM J. BROWN, TOWN CLERK OF BLOOMING GROVE,

Respondents.

----------X

MORTON B. SILBERMAN, J.

Petitioner in this article 78 proceeding moves to punish respondents for contempt for their alleged failure to comply with an order of this Court (KELLY, J.) dated July 31, 1974.

The dispositive facts are not in dispute: In and about October, 1973 petitioner applied to the Planning Board of the Town of Blooming Grove for approval of a certain "survey map" which depicted the location of all existing and proposed structures on petitioner's bungalow colony premises. Such application was made pursuant to section 7-A-10 of the 1953 Zoning Ordinance of said Town. The Planning Board refused to entertain the application upon the grounds that consideration thereof was precluded by

the "stop-gap" ordinance enacted by the Town (Local Law No. 1 of 1972), pending the adoption of a new zoning ordinance.

Petition then brought the within article 78 proceeding. In a decision dated July 17, 1974, Mr. Justice KELLY concluded that the aforesaid stop-gap ordinance was inapplicable to petitioner's said application. Accordingly, in an order dated July 31, 1974, Mr. Justice KELLY directed that "Petitioner's application for approval of the survey map is remanded to the respondent Planning Board, which shall consider the acceptability or non-acceptability of said map in accordance with the terms of Section 7-A-10 et seq. of the Zoning Ordinance [of 1953]."

Respondents appealed from the foregoing order on August 8, 1974. Thereafter, and on or about October 7, 1974, the Town repealed the 1953 Zoning Ordinance and enacted in its place the Town of Blooming Grove Zoning Ordinance of 1974.

In March, 1975 respondents moved in the Appellate Division for an order dismissing their appeal as academic, since the stop-gap ordinance in question had expired and since the 1953 Zoning Ordinance, under which petitioner's application had been made, was superseded by the 1974 Zoning Ordinance. The Appellate Division granted the motion to dismiss in an order dated March 25, 1975.

In and about May, 1975 petitioner appeared before the Planning Board in an effort to obtain approval of his survey map. The Planning Board denied the application in a decision dated May 27, 1975, for the following stated reason: "We find the application to be in violation of the

provisions of the Town of Blooming Grove Zoning Ordinance of 1974, and accordingly, must reject the application."

On the within contempt application, petitioner contends that the Planning Board is required to consider his application under the provisions of the 1953 Zoning Ordinance, in accordance with Mr. Justice KELLY'S aforementioned order, notwithstanding the fact that subsequent to such order the 1953 Zoning Ordinance was repealed and superseded by the 1974 Zoning Ordinance.

It is fundamental that a Court is required to resolve zoning disputes under the zoning ordinance as it exists at the time of decision. Stated another way, the Court is bound by intervening amendments to the zoning ordinance. (See: *Matter of Demissay, Inc. v. Petito,* 31 N Y 2d 896, and authorities cited therein; *Matter of Arcelo Reproduction Co., Inc. v. Modugno,* 31 A D 2d 642.) Accordingly, this Court may not punish respondents for an alleged contempt which consists of a refusal to consider an application under the provisions of a zoning ordinance which no longer exists.

Petitioner's application to punish respondents for contempt is denied. Such denial is without prejudice to any proper proceeding or action petitioner may be advised to initiate to determine his "vested rights" claim.

So ordered.

ENTER:

/s/ Morton B. Silberman
Justice Supreme Court

Dated: New City, New York
September 23, 1975.

Attorneys for petitioner: Gilman, Gilman & Goldstein, Esqs.,
40 Dunning Rd.,
P.O. Box 443,
Middletown, N.Y. 10940

Attorneys for respondents: Jacobowitz & Gubits, Esqs.,
158 Orange Ave.,
Walden, N.Y. 12586

ENTERED SEP 26 1975
1:08 P.M.
/s/ August H. Hansen, CLERK

EXHIBIT D, ANNEXED TO AMENDED COMPLAINT – JUNE 10, 1986 LETTER OF DAREN A. RATHKOPF (Pages 44a-46a).

LAW OFFICES OF
PAYNE WOOD & LITTLEJOHN
130 GLEN STREET
GLEN COVE, N.Y. 11542

(916) 676-0700

June 10, 1986

Mr. Marvin Greene
1783 Flatbush Avenue
Brooklyn, New York 11210

Re: Lake Anne Country Club
Bungalow Colony

Dear Mr. Greene:

You have advised me that the Town of Blooming Grove planning board approved a map showing a total of 136± acres as the area of the above referenced bungalow colony, a use which because non-conforming upon the adoption of an amended zoning ordinance in 1974. You have further advised me that although an area comprising about 10 acres of the approved 136 acres was developed with 125 units, the additional acreage is sufficient for an additional 419 units which you propose to build under the area restrictions which governed planned bungalow colonies. You have also informed me that prior to the amendment of the ordinance you had built a clubhouse, swimming pools and water system designed for the complete development of the use.

You have asked me whether you have a vested right to complete the proposed development by adding the remainder of the units originally contemplated, for which there is room on the site, and for which you have already provided the service facilities. In my opinion you are entitled to complete the development as proposed.

A similar issue was involved in United Citizens of Mount Vernor v. Zoning Board of Appeals of the City of Mount Vernon, 109 Misc. 2d 1080, 441 N.Y.S.2d 626. That case involved a parcel of 29.5 acres. Prior to the adoption of a zoning ordinance making the use nonconforming the Wartburg Orphan Farm School used all but six of these acres for a residential care facility for orphans and the aged. The court held that the Wartburg had a vested right to extend the use by the construction of an additional 30 units on the unused six acres, stating that "if the extension or expansion of the nonconforming use forms an integral part of the original contemplation for the entire parcel, then the right to such extension or expansion becomes vested from the inception and is likewise constitutionally protected." The court stated further:

> "The cottages and orphanages for children, the school, the administration building, the auditorium and the nursing home stand as monuments of its intent. There could not or should not have been any question that Wartburg intended to use this entire parcel for the care of orphans and the elderly." (441 N.Y.S.2d at p. 629)

In my opinion, the fact that you designated 136± acres out of a much larger parcel owned by you as the area to be devoted to bungalow colony use and the fact

that you provided facilities which would allow for the complete development of the site with bungalow units stand as monuments of your intent to develop the entire parcel for the nonconforming use and there could not or should not be any question as to your right to do so.

In Telimar Homes, Inc. v. Miller, 14 A.D.2d 586, 218 N.Y.S.2d 175, a property owner was held to have acquired a vested right to a nonconforming use as to its entire subdivision consisting of four section where a water system, roads, drainage system, model house construction and advertising were laid out and designed for the benefit of all four sections, where substantial construction had been commenced and substantial expenditures made which would have benefited all four sections, even though subdivision maps had been approved for only two of the sections prior to a zoning amendment increasing required lot size.

There are additional factors which would support a claim of vested rights specifically to the 264 additional units for which you applied in 1973. This claim would be independent of rights you have by reason of your existing nonconforming use under such cases as *United Citizens,* supra, and *Telimar Homes,* supra, and would be predicated upon wilful delay on the part of the town authorities in processing your application for approval of the map showing these units. It appears that you applied for such approval in October, 1973. The planning board refused to entertain the application upon the grounds that consideration thereof was precluded by a stop gap ordinance enacted by the Town (Local Law No. 1 of 1972) pending the adoption of a new ordinance, but in fact, as

the court subsequently determined, the stop gap ordinance was inapplicable to the requested approval. An appeal was taken by the planning board, but pending the appeal the 1974 ordinance was adopted and the appeal was withdrawn as moot. Under such circumstances it appears there was administrative procrastination calculated to deny your right to use your land in a then lawful manner and you would be entitled to the same vested rights you would have acquired if the planning board had acted in a timely fashion (Pokiok v. Silsdorf, 40 N.Y.2d 769, 390 N.Y.S.2d 49, and cases cited therein).

I suggest that you submit to the building inspector your map showing the location of the proposed additional 419 units and showing compliance with the restrictions of the 1962 ordinance which established the requirements for such use together with an application for as many of such units as you initially intend to build at one time.

Please let me know if I may be of further assistance to you in this matter.

Very truly yours,

/s/ Daren A. Rathkopf
Daren A. Rathkopf

DAR:jp